

WORK PRODUCT REJECTED: A REPLY TO PROFESSOR ALLEN

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PROFESSOR Ronald J. Allen's comments on my article¹ provide a welcome opportunity to clarify and expand my argument that the limited claims made by economists in favor of work product immunity do not justify the doctrine's continued existence. His response invites me to "reconstitute [the] arguments against work product to dispose of the economic justification for the doctrine."² While I believe that the arguments presented in the original article already address the ex ante, marginal aspects of the economic argument, this reply will address the issue more specifically.

My disagreements with Professor Allen come in three areas. First, I doubt that the marginal increase in incentive to investigate is significant in most cases, although I readily concede that it can exist. Unfortunately, the cases in which there is most likely to be further investigation are those in which it is least likely to lead to more accurate outcomes. Second, positing a marginal increase merely begins the inquiry. Work product immunity can be justified only if the benefits of increased investigation outweigh the costs to litigants and to the judicial system. Finally, I do not expect the elimination of work product immunity to eliminate tactical behavior by attorneys during discovery. Rather, the elimination of work product immunity would shift regulation (court control) of that behavior away from arguments about anticipation of litigation, agency status, or other doctrinal work product issues, and instead focus directly on the real underlying problems of cost, timing, and harassment.

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¹ Elizabeth Thornburg, *Rethinking Work Product*, 77 Va. L. Rev. 1515 (1991).

² Ronald J. Allen, *Work Product Revisited: A Comment on Rethinking Work Product*, 78 Va. L. Rev. 949, 949 (1992).

I. THE LAWYER'S DILEMMA: DECIDING WHETHER TO INVESTIGATE UNDER CONDITIONS OF UNCERTAINTY

As Professor Allen points out, a lawyer deciding whether to investigate further faces uncertainty. It is important to identify separately the variables that she must factor into this decision. In making her decision, the lawyer must estimate, for each variable, the probabilities of various possible outcomes.

A. *Cost of Investigation*

From an *ex ante* perspective, the lawyer will not know the cost, in terms of time and money, of investigating. She will, however, based on experience, be able to estimate the cost. I will call this variable Expected Cost to Investigate (A).

B. *Benefit of Investigation*

Again from an *ex ante* perspective, the lawyer will not know the extent to which acquiring the information sought through further investigation will prove helpful. The potential value will range from zero (for totally useless information) to a high value (for information very helpful to the lawyer's case). Because lawyers can better prepare their own cases when they are aware of bad as well as good facts, even information helpful to the opponent will have value. While the facts themselves may be harmful to the investigating party's case, *learning* the facts has positive value. Although the lawyer will not know the value of information to be uncovered before investigating, she can estimate, based on the probabilities of the various potential outcomes, the value of the information sought. The lawyer's degree of uncertainty will also affect the value she places on the investigation. I will call this variable Expected Value of Investigation (X).

C. *Need to Reveal Information to Opponent*

Whether the results of trial preparation will have to be disclosed to the opponent is also uncertain *ex ante* under the present system. The likelihood of compelled disclosure varies with both the work product doctrine in the relevant jurisdiction and the facts of the case. Thus, application of the existing work product protection to any information is frequently unpredictable. First, tangible items memorializing the investigation (e.g., notes, tape recordings, videos) will be protected

from disclosure only if the court concludes that the investigator was the right kind of agent and that the investigation was done in "anticipation of litigation."³ Second, the work product immunity is only a qualified one. A party may have to divulge work product if a court later finds that the opponent has a substantial need for it and cannot obtain the substantial equivalent of the materials by other means without undue hardship.⁴ Third, the duration of work product immunity is uncertain. Although protected in a particular case, a court in a later, similar lawsuit may require disclosure of work product material.⁵ Even *with* work product immunity, therefore, the lawyer cannot be certain before investigating that the results of the investigation will be protected. Fourth, work product immunity, in theory, does not protect the information learned through pretrial investigation. Work product immunity protects a party from having to respond to a discovery request like "produce your notes from interviewing Witness Jones." It does not, however, protect a party from having to provide its opponent with the information learned from Witness Jones if the opponent correctly words the request.⁶ For example, if the lawyer learned through questioning Witness Jones that the sky is blue, she would have to answer an interrogatory asking "what color is the sky?" even though she learned the information through trial preparation.

The lawyer will estimate the probability of required disclosure. This variable can be characterized as either a cost or as a benefit.⁷ The ability to conduct the investigation without the need to divulge its results could be treated as an additional benefit to the investigating party. Alternatively, the probability of required disclosure can be thought of as an increased cost of the investigation. Because Profes-

³ See Fed. R. Civ. P. 26(b)(3); Thornburg, *supra* note 1, at 1528-29.

⁴ Fed. R. Civ. P. 23(b)(3).

⁵ See generally D. Christopher Wells, *The Attorney Work-Product Doctrine and Carry-Over Immunity: An Assessment of Their Justifications*, 47 U. Pitt. L. Rev. 675 (1986) (considering whether work product material ought ever to be protected in later lawsuits).

⁶ See Thornburg, *supra* note 1, at 1528.

⁷ This is the way in which I discuss the issue in the body of my article. See *id.* at 1545-50. I believe, however, that the results of the analysis are the same whether the secrecy and expense issues are treated as benefits (of being able to keep secrets and increase opponent's cost) or as costs (of having to divulge secrets and provide information to opponents at less expense to them).

sor Allen discusses the problem in terms of cost,⁸ I will call this variable Expected Cost of Divulging Information (B).

D. Combining the Variables: Can Work Product Immunity Create a Marginal Increase in Trial Preparation?

Putting all of these variables together, the lawyer will decide to investigate further if the Expected Value of Investigation exceeds the Expected Cost to Investigate plus the Expected Cost of Divulging Information [$X > A + B$]. If the existence of work product immunity decreases B, then work product immunity may increase the number of occasions on which expected value exceeds expected cost, and we may achieve Professor Allen's marginal increase in trial preparation. In terms of the equation, the increase will occur only when X is greater than A, but not greater than $A + B$. While I do not deny that this will ever happen, I doubt that it will happen often or that it will produce significant information.

1. The Expected Value of Investigation

For the reasons set out at greater length in my article,⁹ for investigations with a possibility of producing useful information, the value of X will be quite high relative to A or B, and to A and B. Even when the expected cost of divulging information (B) is included as a cost item, the lawyer will still deem the expected value of the information to exceed the expected cost and will undertake the investigation.

Uncertainty about the nature of the information that investigation will reveal does not necessarily decrease this value (X). Unless the lawyer is fairly confident that she already possesses all relevant information, or that the potential investigation would yield only marginally useful or cumulative information, she is likely to place a high value on X and choose to investigate. Also, Professor Allen's model assumes a risk-neutral rather than a risk-averse lawyer. In fact, many trial lawyers are risk averse and will choose the possibility of expected costs exceeding expected benefits because they fear an adverse outcome, even when such an outcome is relatively unlikely. The Anglo-American trial system, which gives litigants only a single chance to present evidence to the decisionmaker, feeds the fear. In the face of

⁸ Allen, *supra* note 2, at 950.

⁹ See Thornburg, *supra* note 1, at 1526-30.

this fear, the decision whether to investigate further is unlikely to be affected by changes in work product rules, particularly when the cost of investigating is a cost to the client.

2. *Elasticity of Demand*

Professor Allen's theory assumes a very elastic demand for trial preparation activity: any increase in cost will result in a decrease in investigation. For most trial preparation, however, demand for investigation is relatively inelastic: even if the price goes up, the quantity demanded remains the same. To use a variant on Professor Allen's spaghetti analogy, the demand for trial preparation resembles the demand for breads; it is not a demand for a single product. For basic bread, the quantity demanded remains constant even with increases in price. People must eat; litigants want to win their cases. If the price of croissants increases, however, people will buy fewer. Conceivably, some trial preparation is like croissants, but the bulk of it is more like basic bread. Demand for trial preparation will in most cases be relatively insensitive to increases in cost related to the loss of work product immunity.

Although inelastic, the demand is not limitless. Bread, as used here, is necessary to sustain life. Investigation is only necessary to win a lawsuit. People will buy bread, no matter what the cost, until they run out of money. Litigants, however, "run out of money" to spend on a lawsuit when the expected cost¹⁰ of litigation equals the expected value¹¹ of the litigation. The existence of an outer limit, however, does not change the nature of the demand before the limit is reached.

¹⁰ When estimating "cost" in this sense, I suspect that litigants are concerned with actual out-of-pocket costs without adding the intangible cost of providing information to an opponent more cheaply.

¹¹ Litigants may be motivated by factors other than, or in addition to, the economic value of the lawsuit, such as a desire for vindication, revenge, or the establishment of certain principles. Thus, in using the phrase "expected value of the lawsuit," I include these less tangible factors as well as the estimated stakes in dollars. Also, litigants involved in multiple related lawsuits can calculate costs and benefits for the entire lawsuit group and may choose to spend more on investigation than a particular lawsuit is worth if the value of investigation exceeds the cost of investigation for the entire group of related suits.

3. *Expected Cost of Divulging Information: Work Product vs. No Work Product*

There is another reason that the marginal impact of work product immunity is small: the effective protection provided by the work product doctrine is already limited. Here it is important to distinguish between work product doctrine in theory and work product doctrine in operation.

a. *Theory: We Have No Secrets*

Work product immunity protects trial preparation activity and its products. As a qualified privilege, it does not always protect trial preparation materials, and in theory it never protects the information learned through trial preparation. Therefore, the change in Expected Cost of Divulging Information from current work product doctrine to a lack of work product immunity would be a small one. Because information must be disclosed (if correctly requested) an attorney's ability to keep information from an opponent does not change. Once bad facts are learned, they must be disclosed either with or without work product immunity.

The elimination of work product immunity might lead to a modest increase in the Expected Cost of Divulging Information (based on a decrease in the opponent's cost of securing the information). Again, however, this difference would be insignificant. In neither system must the opponent start from scratch and investigate independently. The difference lies in the skill required of opposing counsel. Without work product immunity, drafting discovery requests would be simpler and therefore less expensive in terms of attorney time (e.g., "Please produce your investigative file.")¹² With work product immunity, the opponent's lawyer must hit upon the correct question before the information will be divulged. The difference in cost, then, is the difference between an easy process and a harder process, between a few production requests and a greater number of interrogatories or depositions. This, rather than the much larger difference in costs between acquiring information from an opponent and doing an independent investi-

¹² Of course, rules unrelated to work product can still complicate the process. For example, the request noted above could be said to be "too broad" and the discovering party required to break the request down into more specific categories.

gation, is the theoretical difference in cost between systems with and without work product immunity.

b. Reality: Secrets and Unequal Resources

Despite the theory that work product immunity hides nothing, in practice the doctrine can result in one party being deprived of information.¹³ Opposing counsel, like Groucho's contestants on "You Bet Your Life," may never manage to say the magic word and win the prize. The information learned through trial preparation may remain available only to the investigating lawyer. This means that eliminating work product immunity would increase the Expected Cost of Divulging Information, but in a manner contrary to theory and detrimental to the operation of the judicial system.¹⁴

When the opponent finds herself unable to acquire information through discovery, she faces the need to do her own investigation. She in turn must estimate the expected cost of investigation and balance it against the expected value of investigation. Having introduced an additional party, we introduce an additional variable—differences in party resources. Even if the expected dollar cost to investigate is the same for both parties,¹⁵ its impact may vary. One party may easily afford the cost, while another cannot, or can only at some sacrifice. One party may have to assess the cost in the context of a single lawsuit while another may be able to spread the cost over multiple, related lawsuits. As the expected value of the information becomes more peripheral or the effective cost higher, a party with more limited resources is increasingly likely to choose to go forward without information held by its opponent. In *A.T.&T. v. M.C.I.*, this factor may be insignificant. In *John Doe v. General Motors*, however, work product immunity may allow significant differences in access to information. In cases where the impact of unequal resources can be expected to result in unequal information, then, eliminating work product immunity would increase the estimated cost of divulging information. This increase should not exist in theory, but probably does exist in practice.

¹³ See Thornburg, *supra* note 7, at 1551-55.

¹⁴ *Id.*

¹⁵ In fact, the cost of investigation may be very different for different parties. See *id.* at 1548.

Professor Allen is right. There may be cases in which work product immunity can lead to a marginal increase in trial preparation. This marginal increase has costs, both internal and external, which cannot be ignored.

II. THE MARGINAL INCREASE COMPARED TO ITS COST

So far, I have established that work product immunity may on occasion result in a marginal increase in trial preparation, especially in cases involving peripheral information or differences in party resources. Work product immunity, however, must be analyzed in terms of its effect on the judicial system, not merely in terms of its impact on a party's trial strategy. The overall benefit from a marginal increase in trial preparation must exceed its overall costs.

A. *Benefit*

In order to be of benefit in this larger sense, the marginal increase must benefit the judicial system as well as the individual litigant. This benefit, however, is likely to be small. Any additional information gained may not influence the decisionmaker or, indeed, may never reach it. As discussed above, the marginal increase in investigation will most likely occur when the expected value of the information is small, i.e., for information only slightly useful in the lawsuit, or when resource differences allow facts to be hidden. Even assuming that the additional information is presented to the trier of fact, it may have no effect on the outcome of the case. Alternatively, the additional information may not be presented to the trier of fact. It may be that the information is irrelevant. Or, in the situation of unequal party resources, the information learned in the investigation may be a "bad" fact which the investigating party succeeds in hiding from her opponent. If the information gained from the increased investigation does not reach or does not influence the trier of fact, it does not benefit the trial process.

B. *Cost*

The small potential increase in benefit generated by additional investigation must be balanced against its cost. As discussed at length in my article, the existence of work product immunity results in increased costs to the parties: increased cost of trial preparation (including the cost of work product disputes), and cost of undiscov-

ered information.¹⁶ Work product immunity also results in systemic costs: waste of additional resources on trial preparation, transaction costs of deciding work product disputes, and harm to the general deterrence function of litigation caused by the information imbalance fostered by the work product doctrine.¹⁷ From the standpoint of the judicial system as a whole, then, the costs of work product immunity far exceed its benefits.

III. WORK PRODUCT AND TACTICAL BEHAVIOR

I wish I could be utopian.¹⁸ However, it would not surprise me in the least if the loss of work product immunity redirects rather than eliminates lawyers' use of discovery for tactical purposes. Lawyers will, as Professor Allen suggests, undoubtedly attempt to manipulate the timing of investigations and the allocation of the costs of information gathering.

None of this, however, is beyond the control of the court. Just as the court now regulates discovery in ruling on work product claims, with work product eliminated it could regulate tactical behavior. Courts can, as they already do, enter discovery scheduling orders. Courts can, as they already do, impose sanctions such as excluding evidence for violating these orders. Courts can, as they already do with experts, enter orders allocating costs. The tactical behavior may not stop, but it can be addressed directly. The courts may need to intervene, as they already do.

Without work product doctrine masking the issue, the court would be deciding discovery disputes that come closer to the real source of the dispute: who will investigate? when must it be done? who pays? This is far preferable to deciding those same disputes in the guise of rulings about the application and scope of work product immunity. If our concerns are about costs and free riders, we should argue about costs and free riders, not about "anticipation of litigation." If our concerns are about harassment, we should argue about harassment,

¹⁶ Id. at 1550-71.

¹⁷ Id. at 1571-73.

¹⁸ Allen, *supra* note 2, at 952. In response to this particular claim of utopian tendencies, I do not claim that it is unseemly to appropriate an opponent's work product. Rather, I claim that it is foolish and ineffective to base a case *solely* on an opponent's work product without also doing independent preparation of one's own. Also, to the extent that Professor Allen is adopting the "sharp practices" argument here, see Thornburg, *supra* note 1, at 1532-43.

not about the scope of pure opinion work product. If our concerns are about timing, we should argue about timing, not about the difference between discovery orders and pretrial orders. This is not replacing private incentives with government regulation.¹⁹ This is replacing regulation that uses surrogate factors (the parameters of the work product doctrine) with regulation that more directly addresses the reasons for the parties' disputes.

CONCLUSION

In some ways, Professor Allen and I do not disagree. I agree²⁰ that in theory there can in some cases be a marginal increase in incentive to investigate because of the work product immunity's ability to increase an opponent's costs. I believe this marginal increase to be insignificant while Professor Allen believes it to be more important. Our disagreement here stems primarily from different assumptions about how lawyers preparing for trial behave. Unlike Professor Allen, I believe further that any benefit the marginal increase can generate is small and is outweighed by its cost. The elimination of work product immunity from the arsenal of the discovery wars would not create a perfect world,²¹ but it would produce a better one. I remain convinced that even from an economic perspective, the work product immunity must go.

¹⁹ Allen, *supra* note 2, at 952 n.11. Litigation activity is hardly a free market. The very existence of the lawsuit depends on government compulsion to appear and answer. Likewise, a party's need to respond to an opponent's discovery requests exists only because the courts can compel compliance with the discovery rules. A shift in the enforcement mechanism may change the context of the regulation, but it does not introduce regulation for the first time.

²⁰ I also agreed in my original article. Thornburg, *supra* note 1, at 1549.

²¹ Cf. Allen, *supra* note 2, at 955.